RESPONSE REQUESTED

Supreme Court, U.S.
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NO. 02-531 (2)

IN THE SUPREME COURT OF THE UNITED STATES

OKANOGAN SCHOOL DISTRICT NO. 105, ET AL.,

Petitioners,

v.

DR. TERRY BERGESON, IN HER OFFICIAL CAPACITY AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF WASHINGTON; AND MICHAEL J. MURPHY, IN HIS OFFICIAL CAPACITY AS THE TREASURER OF THE STATE OF WASHINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Attorney General of Washington on behalf of the Washington State Superintendent of Public Instruction and the Washington State Treasurer respectfully requests that this Court deny the petition for a writ of certiorari in this case.

STATEMENT

Washington receives federal forest funds under 16 U.S.C. § 500. This case concerns the state's use of this money to fund the state's public schools in counties where national forests are located.

The Washington Constitution provides that it is "the paramount duty of the state to make ample provision for the education of all children" in the state, and it directs the Legislature to "provide for a general and uniform system of public schools". Wash. Const. art. IX, §§ 1, 2.

To meet its constitutional obligation, the Legislature adopted the Basic Education Act, Wash. Rev. Code §§ 28A.150.200 *et seq.* The largest part of basic education funding is called the basic education allocation. Wash. Rev. Code §§ 28A.150.250-.260. It is based on the annual average full-time equivalent (FTE) student enrollment in each school district. For example, each district is entitled to 49 certificated instructional staff for every 1,000 FTE students enrolled in grades kindergarten through third grade. Wash. Rev. Code § 28A.150.260(2)(b)(i). Based on a complex series of formulas, the state calculates the basic education allocation for each school district.

In addition to the basic education allocation, school districts receive other basic education funding for things such as special education, Wash. Rev. Code § 28A.155.010, student transportation, Wash. Rev. Code § 28A.160.150, and bilingual education, Wash. Rev. Code § 28A.180.080. The state also provides educational enhancements that go beyond basic education. This includes things such as special funding for highly capable students, Wash. Rev. Code § 28A.185.020, learning assistance programs, Wash. Rev. Code § 28A.165.040, and traffic safety education, Wash. Rev. Code § 28A.220.040.

School districts are authorized to levy property taxes. Wash. Rev. Code § 84.52.053. However, under the Washington Constitution, school district levies may not be used to "discharge the State's paramount duty of making ample provision for basic education" and may only be used, instead, "to fund an enrichment program which goes beyond that required by the constitution[.]" *Seattle Sch. Dist. 1 v. Washington*, 585 P.2d 71, 99 (Wash. 1978) (internal punctuation omitted). School districts that levy property taxes may qualify for additional state funds for local levy assistance. Wash. Rev. Code §§ 28A.500.010 *et seq.* The purpose of this levy assistance is to offset the effect that above average property tax rates may have on the district's ability to raise local revenue to pay for enrichment programs.

The state also receives federal funds. This case concerns funds paid to the state pursuant 16 U.S.C. § 500.[1] Under 16 U.S.C. § 500, certain revenues derived from national forests are paid by the federal government directly to the states in which the forests are located. 16 U.S.C. § 500 provides that "*twenty-five per centum* of all moneys received during any fiscal year from each national forest *shall be paid*, at the end of such year, by the Secretary of the Treasury *to the State* or Territory in which such national forest is situated[.]" Pet. at 2 (emphasis added). The statute directs that these funds are "*to be expended as the State* or Territorial *legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated*[.]" Pet. at 2 (emphasis added).

Federal forest funds received by the state are deposited in the federal forest revolving fund and state law provides that the funds "shall be expended in accordance with the requirements of Title 16, section 500, United States Code[.]" Wash. Rev. Code § 28A.520.020(4). All of the funds are distributed to

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[1] The state and school districts receive other federal funds from a variety of other federal programs—Elementary And Secondary Education Act, 20 U.S.C. § 6301 *et seq.*; the Individuals With Disabilities Education Act, 20 U.S.C. § 1401 *et seq.*; Carl Perkins Act, 20 U.S.C. § 2301 *et seq.*; and the National School Lunch And Breakfast Programs, 42 U.S.C. § 1751 *et seq.* These federal funds are not at issue in this case.

counties that contain the forest land from which the revenue was generated in the following manner:

The State Treasurer, who is custodian of the account, allocates fifty percent directly to the counties to be spent at the counties' discretion for the benefit of public schools, public roads, or other public purposes authorized by federal law. Wash. Rev. Code § 28A.520.020(1). Pet. at 2. The remaining fifty percent is distributed directly to the school districts in the counties in proportion to the number of full-time equivalent students in the district, as of the October enrollment count. Wash. Rev. Code § 28A.520.020(2). Pet. at 2.

The law provides that federal forest funds distributed to a school district are to be credited toward a district's basic education allocation. Wash. Rev. Code § 28A.520.020(3). Pet. at 2. For example, petitioner Okanogan School District received a total of $91,378 in federal forest revenues in fiscal year 1998-99. Thus, $91,378 was credited toward the District's basic education allocation. Thereafter, the state gave the District an additional $3,743,136 to reach the basic educational allocation. In the same fiscal year, the state allocated to the Okanogan School District $1,889,229 for other basic education programs and state enhancement programs. In addition, the state paid the District $379,505 for local levy assistance. Thus, during the 1998-99 fiscal year the

state paid the Okanogan School District $6,103,248.[2] The $91,378 in forest revenues received by the District is therefore equal to approximately 1.5 percent of the state monies received by the District.

Petitioners object to the fact that the federal forest funds they receive are credited against their basic education allocation. In February 2000, Okanogan School District, along with seventeen other school districts, Okanogan County, and two private citizens filed a complaint in United States District Court for the Western District of Washington. The named defendants were the Washington State Superintendent of Public Instruction and the Washington State Treasurer. The plaintiffs requested a declaratory judgment that Wash. Rev. Code § 28A.520.020(3) violates the Supremacy Clause of the United States Constitution and also sought compensatory damages. The defendants filed FRCVP 12 motions to dismiss the county and school district plaintiffs and to dismiss all damage claims. The court granted both motions. Pet. at 23a. Because the court's order appeared overly broad, both parties sought and were granted clarification that only the citizen plaintiffs claims for prospective relief remained in the case. Pet. at 24a. The defendants thereafter filed a motion for summary judgment on the merits and to dismiss the

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[2] During the fiscal year ending August 31, 1999, Okanogan School District also received a total of $785,135 in federal revenues from a variety of federal programs. *See* note 1 *supra* p. 3.

remaining citizen plaintiffs for lack of standing. The plaintiffs filed a cross-motion for summary judgment on the merits. The court granted summary judgment in favor of the defendant state officials on both issues. Pet. at 33a.

Eight of the original school district plaintiffs and the citizens appealed the order dismissing the political subdivisions and the summary judgment order. The Ninth Circuit affirmed the dismissal of the political subdivisions based on its decision in *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980), which held that political subdivisions do not have standing to challenge the constitutionality of a state statute. The court below declined to recognize an exception to the rule in *City of South Lake Tahoe* in this case, stating there was "no reason to except Okanogan on account of anything in particular that [16 U.S.C.] § 500 has to say about school districts". Pet. at 9a.

The court also reviewed the standing of the citizens, raising "serious questions" about both constitutional standing and prudential principles. Pet. at 14a. Specifically, the court was concerned that the citizens could not meet the causation and redressability prongs of the Article III analysis; that the dispute with the state was outside the zone of interests protected by 16 U.S.C. § 500; and the claim raised a generalized grievance regarding how the state should distribute its education dollars. Pet. at

14a. Without ruling on the citizens' standing, the court proceeded to the merits.

On the subject of the merits, the court concluded that the plain language of the statute directs that forest funds be paid to the state and permits the state Legislature great discretion in prescribing how best to use the moneys for the benefit of public roads or schools. The court also distinguished the Federal Impact Aid Act and the line of cases construing it; noting the differences between the text of the Impact Aid statute and 16 U.S.C. § 500. Finally, the court recognized that the Secure Rural Schools And Community Self-Determination Act of 2000, Pub. L. 106-393, 114 Stat. 1607, added no conditions to the receipt of federal forest funds. Rather, it left the text of 16 U.S.C. § 500 intact. "Section 500 does not constrain how the state allocates its own money, or how school districts spend theirs." Pet. at 17a.

Petitioners filed a petition for rehearing with suggestion for rehearing en banc which was denied July 15, 2002.

REASONS FOR DENYING THE PETITION

The petition presents three questions. The main question (number 3) is whether Wash. Rev. Code § 28A.520.020(3), which authorizes the federal forest funds received by a school district to be credited against the district's basic education allocation, violates the Supremacy Clause. This does not present a substantial federal question. The

decision below is consistent with *King County v. Seattle School District 1*, 263 U.S. 361 (1923), *Carroll v. Bruno*, 499 P.2d 876 (Wash. 1972), and *Oklahoma v. State Board of Education*, 293 P.2d 583 (Okla. 1956). Each of these cases dealt with 16 U.S.C. § 500 and rejected the notion that school districts have a right to federal forest funds. *Carroll* and *Oklahoma* reject the precise claim made by the petitioners in this case. Petitioners do not cite—and we unaware of—any contrary decision interpreting 16 U.S.C. § 500. There is no conflict for the Court to resolve. Petitioners simply disagree with the courts' consistent interpretation of the statute.

Petitioners claim that their other two questions present conflicts that should be resolved by the Court. Question number 2 asks whether 16 U.S.C. § 500 confers standing on students to challenge Wash. Rev. Code § 28A.520.020(3). The court below did not reach this issue and petitioners' claim that the refusal to confer standing creates a conflict is simply not credible. Petitioners are simply trying to manufacture a conflict where none exists.

Finally, question number 1 asks whether a school district, as a political subdivision of the state, has standing under 16 U.S.C. § 500 to challenge Wash. Rev. Code § 28A.520.020(3). The court below ruled that the school district did not have standing. Other circuits—in cases that did not involve 16 U.S.C. § 500—have ruled that political subdivisions do have standing to challenge a state law

based on other federal statutes and the Supremacy Clause. Thus, there is some conflict between the decision below and these cases. However, the conflict is neither as great as petitioners claim nor ripe for review. Also, this case presents a particularly poor vehicle to resolve the conflict in light of the fact the judgment below on the main question does not present a substantial federal question.

1. The Decision Below Interpreting 16 U.S.C. § 500 Is Consistent With Every Other Decision Interpreting that Statute

The Ninth Circuit's decision that 16 U.S.C. § 500 does not prohibit the state from crediting federal forest funds against the basic education allocation is consistent with every other decision interpreting that statute. Beginning with this Court's decision in *King County*, courts have consistently rejected the notion that school districts have a right to federal forest funds. At the time of *King County*, state law provided that the county was responsible for distributing all federal forest funds. One year the county distributed less than half of the funds to the school district, and the district sued to obtain an even split. This Court rejected the school district's claim because it concluded that "[w]hen turned over to the state, the money *belongs to it absolutely*. There is no limitation upon the power of the Legislature to prescribe how expenditures shall be made for the purposes stated[.]" *King County*,

263 U.S. at 364 (emphasis added). The Court emphasized that the federal forest funds "granted by the United States *are assets in the hands of the state* to be used for the specified purposes as it deems best" and that "[n]o trust for the benefit of the [school district] is created by the grant." *Id.* at 364-65 (emphasis added); 364.

Carroll involved exactly the same claim raised by petitioners. In *Carroll*, the plaintiffs challenged a prior version of Wash Rev. Code § 28A.520.020(3) and claimed that including "federal forest funds in the general statewide equalization formula spreads the benefits to the entire state and thus deprives the districts designated by federal law from the very benefits intended to be granted them." *Carroll*, 499 P.2d at 877. The Washington Supreme Court rejected this claim. *Id.* at 879 ("We are of the opinion, therefore, that 16 U.S.C. § 500 (1960) which makes available national forest funds to school districts of the state having national forests within their areas, does not preclude the Superintendent of Public Instruction from including them in state equalization funds.").

The Oklahoma Supreme Court also considered and rejected exactly the same claim in *Oklahoma*, 293 P.2d at 584.

The decision below is consistent with these decisions. Petitioners do not cite—nor are we aware of—any contrary decisions interpreting 16 U.S.C. § 500. Moreover, the decision below is correct. The

plain language of 16 U.S.C. § 500 expressly provides that federal forest funds shall be "*expended as the State or Territorial legislature may prescribe* for the benefit of the public schools and public roads of the county or counties in which such national forest is situated[.]" (Emphasis added.) Here, Washington expends the funds to support the school district's basic education allocation in counties that contain national forests. This falls within the terms of 16 U.S.C. § 500. *King County*, 263 U.S. at 364 ("public schools . . . are provided and maintained by the state or its subdivisions, and the moneys granted by the United States are assets in the hands of the state to be used for the specified purposes as it deems best").

Petitioners argue that the Secure Rural Schools And Community Self-Determination Act of 2000 (SRSCS Act), Pub. L. 106-393, 114 Stat. 1607, requires a different result. Pet. at 27-29. However, the Ninth Circuit correctly concluded that this act did not alter the distribution command of 16 U.S.C. § 500. The SRSCS Act was intended to preserve levels of payments—not alter states' use of the payments.

Under section 102(b), counties can elect to receive either the twenty-five percent revenues traditionally calculated under 16 U.S.C. § 500 or an amount equal to a calculated average of the three highest payments during the years of 1986-99. What is significant is that the text of 16 U.S.C. § 500 is preserved, still paying the federal forest funds to the

state to be expended, as the state Legislature may prescribe.

Congress is presumed to be aware of judicial interpretation of a statute. *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 382 n.66 (1982). There has been a consistent judicial interpretation of 16 U.S.C. § 500 going back to *King County* in 1923, and Congress failed to clearly express any intent to alter the conditions under which the states receive the federal grant. Further, nothing in the Congressional Record excerpt submitted by petitioners reveals an intent to amend the way Washington allocates its forest funds or state education moneys.

Since the courts are in agreement about the meaning of 16 U.S.C. § 500, petitioners make several other arguments in an attempt to make the question seem important. They claim that school districts are losing a substantial amount of funds—$100,000 a year in the case of the Okanogan School District. Pet. at 25. But this amounts to only 1.5 percent of the $6 million the state provides to the Okanogan School District to operate the public schools. Petitioners also argue that this will be the Court's only chance to consider the issue because only Washington and Oregon offset federal forest funds against state educational funding. Pet. at 30. However, the fact that petitioners' complaint is limited to just two states counsels against granting the petition. It is difficult to say that a decision that

affects only two states has national significance to require review by this Court.

2. Petitioners' Second Question Does Not Involve A Conflict

Petitioners' second question asks whether 16 U.S.C. § 500 confers standing on students to challenge Wash. Rev. Code § 28A.520.020(3). The Ninth Circuit did not reach this issue and petitioners claim that this failure runs afoul of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Pet. at 18-20. Yet *Steel Co.* laid down no bright line rule that it was impermissible for a court to consider the merits of a case and, thus, avoid the standing issue. *Steel Co.*, 523 U.S. at 110-11 ("I write separately to note that, in my view, the Court's opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in reserving difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." J., O'Connor, concurring (internal punctuation omitted) (citation omitted)); *id.* at 111 ("This Court has previously made clear that courts may reserve difficult questions of jurisdiction when the case alternatively could be resolved on the merits in favor of the same party." J., Breyer, concurring in part and concurring in the judgment (internal punctuation omitted) (citation omitted)). In this case the court below was faced with a difficult standing question. It was permissible

for the court to avoid that difficult question and resolve the case on the merits in favor of the same party—in this case respondents.

Petitioners argue that the Ninth Circuit's failure to grant the individual student plaintiffs standing "creates a conflict with every court to consider similar allegations[.]" Pet. at 20. This argument misunderstands the concept of conflict as used in Rule 10. The fact that the Ninth Circuit did not rule on the standing issue does not conflict with any case where the court found standing.

Moreover, the primary case relied on by petitioners (Pet. at 20-21), *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984), did not involve 16 U.S.C. § 500.[3] Instead, *Gwinn* dealt with the Impact Aid Act under which the United States makes payments directly to school districts. *Gwinn*, 741 F.2d at 842. Even if the Ninth Circuit ruled that the students did not have standing under 16 U.S.C. § 500 there would be no conflict with

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[3] Petitioners also claim the decision below conflicts with a district court decision, *Shepheard v. Godwin*, 280 F. Supp. 869 (E.D. Va. 1968). Pet. at 21. This case is even further removed. The court never discussed standing, and it is not clear that the plaintiffs were students. The court described the plaintiffs as "[r]esidents, real estate owners and taxpayers" of the county whose grievance was having "to make up the unindemnified portion of the impact costs". *Shepheard*, 280 F. Supp. at 871, 873. Similarly, decisions of this Court cited by petitioners (Pet. at 21) involve different statutes and do not even discuss the issue of standing. *Papasan v. Allain*, 478 U.S. 265 (1968); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Gwinn. The fact that one court concludes there is standing under one statute does not create a conflict with a court that concludes there is no standing under another statute. However, since the Ninth Circuit did not reach this issue it is simply an academic question—not a substantial federal question that requires resolution by this Court.

3. Petitioners' First Question Is Not Ripe For Review

The court below held that petitioner school districts, as political subdivisions of the state, did not have standing under 16 U.S.C. § 500 to challenge Wash. Rev. Code § 28A.520.020(3) under the Supremacy Clause. Pet. at 8a-10a. This decision is consistent with other Ninth Circuit decisions rejecting challenges to state statutes by political subdivisions under the Supremacy Clause. *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir.), *cert denied*, 525 U.S. 873 (1998); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104 (9th Cir. 1999), *cert denied sub nom Palomar Pomerado Health Sys. v. Bonta*, 528 U.S. 1074 (2000).

Here too, petitioners argue that the decision below conflicts with other court of appeals decisions that have recognized that a political subdivision may challenge the constitutionality of a state law under the Supremacy Clause. Petitioners primarily point to *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert denied*, 444 U.S. 827 (1979), *United States*

v. Alabama, 791 F.2d 1450 (11th Cir. 1986), *cert denied sub nom Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085 (1987), and *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), *cert denied sub nom Branson School District RE-82 v. Owens*, 526 U.S. 1068 (1999). Pet. at 11-14.

Unlike petitioners' second question, there is some conflict between the decision below and the cases cited by petitioners. However, petitioners exaggerate the extent of the conflict. The court below did not simple apply a per se rule. It also looked at the substance of 16 U.S.C. § 500 to see if the school districts had standing. *Okanogan School Dist. 105*, Pet. at 9a ("We have declined to recognize an exception for Supremacy Clause claims . . . and there is no reason to except Okanogan on account of anything in particular that § 500 has to say about school districts. To the contrary, to the extent that § 500 names beneficiaries at all, it names *states* and *counties*. It does not mention *school districts*.").

Even courts that recognize that political subdivisions may have standing in principle do not grant standing if they conclude that Congress did not intend political subdivisions to be able to challenge a state law. For example, in *United States v. Alabama*, 791 F.2d 1450, cited by petitioners (Pet. at 11), the court recognized that the Eleventh Circuit had not adopted a per se rule. *Id.* at 1455. Despite this fact, the court ruled that the state university lacked

standing to bring an action against the state under Title VI. *Id.* at 1456-57 ("Absent any indication of Congressional intent to grant additional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.").

Similarly, courts that recognize political subdivision standing in principle would likely concluded that school districts have no standing under 16 U.S.C. § 500. Section 500 does not mention school districts, and this Court held in *King County*, 263 U.S. at 364, that the grant of federal forest funds did not create a trust for the benefit of school districts and that the funds were, in fact, assets of the state. Thus, while there is a conflict about whether there should be a per se rule, there is likely no conflict about school district standing under 16 U.S.C. § 500.

Moreover, this conflict is not ripe for review because the various courts of appeal have not considered the impact of this Court's recent federalism decisions. The crux of petitioners' first question is whether Congress, acting under the Supremacy Clause, can authorize a political subdivision of the state to challenge the constitutionality of a state law in federal court. This question involves a fundamental issue of federalism—the power of Congress to authorize a creature of the state to challenge the laws of its creator.

In recent decisions, this Court has limited the power of Congress to intrude on state sovereignty. The Court has strictly defined the power of Congress to waive the states' Eleventh Amendment immunity to suite in federal court. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (the Commerce Clause does not authorize Congress to waive state Eleventh Amendment immunity); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Congress acted beyond the scope of the authority granted in section 5 of the Fourteenth Amendment in waiving state Eleventh Amendment immunity); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (same); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (same). In the same vein, the Court ruled that Congress lacks the authority to waive state sovereign immunity to suite in state court. *Alden v. Maine*, 527 U.S. 706 (1999). The Court has also limited the power of Congress to require a state to enact or enforce a federal regulatory program or conscript the state's officers directly. *New York v. United States*, 505 U.S. 144 (1992) (Congress could not require states to accept ownership of low level radioactive waste or regulate according to instructions of Congress); *Printz v. United States*, 521 U.S. 898 (1997) (Congress could not require local sheriffs to conduct background checks on prospective handgun purchasers).

Petitioners' first question implicates all of the concerns behind the Court's recent federalism

decisions. It involves both bringing the state into federal court and direct action by Congress on the states' political subdivisions. Yet the cases relied on by petitioners to establish the conflict were decided before most of the Court's federalism decisions. Thus, it would be prudent to let this issue percolate in the courts of appeal to allow them to consider the impact of these recent decisions on the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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